

Part 6 of 10

TENNESSEE VALLEY AUTHORITY

c) EPA Enforcement bases its allegations of NSR violations (other than SO₂ at Colbert Unit 5) upon an emissions increase test commonly referred to as the "actual-to-potential" test. That test compares the actual pre-change baseline to the maximum potential to emit of the unit if it were operated twenty-four hours a day for 365 days in a year. In the Compliance Order, however, the Region stated that actual pre-modification emissions are compared with "projected actual emissions" after the modification, in order to establish an NSR violation. Compliance Order ¶ 18. Given this clearly stated predicate in the Compliance Order, the Board finds that EPA Enforcement should not, on reconsideration, be permitted to substitute the more stringent actual-to-potential test. (See Part III.D.5.a of the Order)

d) The Board rejects TVA's argument that post-change emissions should be based upon post-change historical operating data. Because the statute and regulations contemplate that the regulated entity must predict future events in order to determine whether a permit is required, it is appropriate to base a finding of violation (for failure to obtain the permit) upon what the entity reasonably could have predicted prior to beginning construction. (See Part III.D.5.b of the Order)

e) Applying a projected actual emissions test and the representative baseline period, the Board concludes that EPA Enforcement has failed to show the requisite emissions increases for a number of the pollutants at some of the units for which it had requested a finding of violation. However, the Compliance Order must be sustained with respect to twenty remaining violations of the PSD and/or nonattainment NSR permitting requirements. This includes violations of at least one pollutant for each of the fourteen units, except for Widows Creek Unit 5. (See Part III.D.5.c of the Order)

3) With respect to the emissions increase requirement as applied under the NSPS program and the Alabama SIP nonattainment NSR provisions applicable prior to 1983, EPA Enforcement has demonstrated that the physical changes to TVA's Colbert Unit 5 both required a nonattainment NSR permit with respect to SO₂ emissions and triggered the NSPS requirements. (See Part III.E of the Order)

4) EPA Enforcement has demonstrated that TVA was in violation of the minor NSR permit requirements of the Alabama and Tennessee SIPs (including provisions pertaining to the Memphis-Shelby County Air Pollution Control Board), as alleged in the Compliance Order. (See Part III.F of the Order)

5) With respect to the Compliance Order's remedies for the violations identified above, section IV.1.(h) of the Compliance Order (regarding surrender of SO₂ allowances) is vacated as premature. The requirements that TVA submit schedules for it to come into compliance with the CAA with respect to the violations we have sustained, and, more generally, the requirements set forth in sections IV.1.(a) to (g) of the Compliance Order are sustained. The requirements that TVA apply for, and obtain, NSR permits for the units and pollutants as to which EPA Enforcement established a violation are also sustained. Notwithstanding provisions in the Compliance Order which may purport otherwise, the determination of what pollution controls will be required under the permits